



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

CABLE TELEVISION

I/M/O an Inquiry into the)
Operations of RCN of New Jersey)

ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
A PROTECTIVE ORDER

BPU Docket No. CX01070460

(SERVICE LIST ATTACHED)

BY THE BOARD¹:

On September 26, 2001, the Board of Public Utilities (Board) ordered, *inter alia*, that RCN Telecom Services, Inc. (RCN) provide the Office of Cable Television (OCTV) with a detailed plan of its commitment to upgrade and/or rebuild the thirty-one municipalities it serves by October 5, 2001. The directive was contained within the Board's October 4, 2001 Order. The October 4 Order addressed the adequacy of RCN's cable television and customer service after receiving comments during the Princeton and Clinton service hearings held on September 6 and 10, 2001. On October 5, 2001, RCN filed a response which was deemed deficient by OCTV Staff. The plan failed to identify twenty-four of the thirty-one municipalities RCN serves and had committed to rebuild/upgrade. The plan named a few municipalities in passing without sufficient detail. On October 15, 2001, the Attorney General's Office requested RCN to submit a detailed response by October 22, 2001 in compliance with the Board's Order. On that date, RCN submitted a supplement to its October 5 filing which contained additional information on the rebuild/upgrade.

RCN prepared a schedule as part of its submission which described each phase of work in Hunterdon, Morris and Mercer counties, including municipalities in each phase, start and completion dates, estimates of the cost of construction, total miles of system plant, number of homes passed, projected subscribers and capital expenditures. RCN averred that because the schedule contained detailed information concerning its business plan, it should be deemed proprietary and maintained as confidential by the Board. Unredacted versions of the filing containing the proprietary information were filed directly with OCTV Staff for review.

RCN stated that the information had been produced solely for its internal use and was being provided to the Board and to Staff at the Board's direction. RCN also stated that the information contained in the schedule was considered proprietary and confidential and had not been released to the public or to any other cable television regulatory body. RCN maintained that the Board was obligated to protect the confidentiality of a company's proprietary information from public disclosure. According to RCN, the release of the information contained within the schedule would unduly harm RCN's legitimate business and competitive interests. In addition, RCN argued that other cable television operators have, or may reasonably be expected to,

¹ Commissioner Carol J. Murphy did not participate in the deliberations or vote on this matter.

approach municipalities in which RCN provides cable television service and propose, or make an application to provide, services which compete with those of RCN. According to RCN, specific information as to the plan for the order of construction, projected costs and projected subscribers would, if available for public inspection, unduly harm RCN's competitive position and give competitors an unfair business advantage. RCN therefore requested that the Board afford the information contained within the schedule confidential treatment.

In the Board's Order dated December 19, 2001, we found that RCN had not demonstrated that the schedule contained legitimate proprietary and confidential information worthy of protection from public disclosure. We determined that good cause had not been shown by RCN that disclosure of the information contained within the schedule could harm its legitimate business and competitive interests and result in financial injury if it fell into the hands of competitors. We also found that disclosure of the projected costs and calculations of construction would not be harmful to RCN if released to the general public or competitors. We determined that disclosure of the projected financial calculations contained in the columns titled: "Cap Ex," "Already Constructed," "Cap Ex to Complete," and "Inventory" on page 1 of Exhibit 'A' of the schedule would not harm RCN's competitive position and give potential competitors an unfair business advantage." December 19, 2001 Order at 2.

On January 10, 2002, the Board received RCN's Motion for Partial Reconsideration of the December 19, 2001 Order. RCN disagrees with the Board's conclusion and seeks reconsideration of the Board's determination to not protect certain of the information from disclosure to the public. It should be noted that RCN is not seeking reconsideration of the Board's determination with respect to the columns of the schedule containing information as to total aggregate costs, the construction schedule by municipality, the columns titled "Start" and "Finish" dates, "UG and Total Miles," "Homes Passed" and number of "Video Subscribers." Instead, RCN requests reconsideration of that portion of the December 19, 2001 Order denying its request to maintain as confidential the specific information of each community under the columns "Cap Ex," "Already Constructed," "Cap Ex to Complete," "In Inventory," "Cable Modem Subs," "Cap Ex/Homes Passed" and "Cap Ex/Sub."

In support of its motion, RCN cited In Re Solid Waste Utility Customer Lists, 106 N.J. 508 (1987), for the proposition that the Board is obligated to protect the confidentiality of a company's proprietary information from public disclosure and that "the legitimate public interest in certain information must be balanced with the competing right of privacy of the individuals possessing such information." Id. at 522. RCN averred that the threat to its legitimate competitive interests is not hypothetical or speculative but real and viable. RCN stated that the Board has issued or has pending before it petitions for Certificates of Approval to overbuild at least three communities discussed in its schedule - Mendham Borough, Mendham Township and Long Hill Township. RCN also maintained that other applications are pending in various other communities it presently serves seeking similar relief. According to RCN, knowledge of the actual dollar amount spent and pending, listed by each community, would give a competitor valuable insight into a plan for an overbuild. RCN also claimed that knowledge of its projections of customers for the competitive modem service in each community it serves would provide a road map for a competitor to plan a marketing strategy. According to RCN, a competitor has no legitimate interest in access to this type of internal financial information. In addition, RCN maintained that the release of specific dollar projections for each community during each phase of construction, when there is an existing facilities-based competitor attempting to provide similar services results in an unfair economic insight into its overall business strategy to that competitor. RCN averred that such a result would create serious financial injury to it.

RCN also cited I/M/O the Petition of Cablevision Lightpath-NJ, Inc., for the Authority to Provide Local Exchange and Interexchange Telecommunications Services, BPU Docket No. TE97120883 (March 26, 1998) and I/M/O the Petition of Comcast Cablevision of Central New Jersey, Inc., for a Renewal Certificate of Approval in the Township of South Brunswick, BPU Docket No. CE95010027 (February 19, 1997) for the proposition that the Board routinely protects financial and technical information from public disclosure in competitive situations. The Lightpath matter involved the filing of a petition with the Board requesting authority to provide local exchange and interexchange telecommunications service in New Jersey. The filing also contained a motion for protective treatment of certain materials filed in support of the petition.

Specifically, Lightpath requested protection from public disclosure of the pro forma income statements and estimated balance sheets filed in support of the petition. According to Lightpath, the information contained in the statements was based upon computations of its anticipated traffic volumes, which thereby provide indications of its potential market share in the New Jersey local exchange and interexchange markets. Lightpath asserted that such market share calculations were intensely sought after by competitors because they could provide a carrier's projected degree of market penetration and success of marketing schemes. Lightpath contended that access to this type of information would provide its competitors with an unfair advantage and would thereby compromise the public benefits obtained from the operation of the competitive marketplace without unnecessary regulatory intervention. After review, the Board granted Lightpath's motion, finding with regard to the income statements and estimated balance sheets, that they were sensitive financial records which merited protection.

The Comcast matter cited by RCN involved the issuance of a Renewal Certificate of Approval to serve the Township of South Brunswick. Contained within the municipal ordinance was a reference to a separate Agreement entered into by the parties. The Agreement provided for the use of an Institutional Network (I-Net) for the purpose of data transmission capability for the Township and its subdivisions.

Comcast averred that disclosure of the business and financial information contained in the Agreement would provide competitors with considerable knowledge about its business practices as they pertain to the provision of data transmission capabilities. According to Comcast, this would give competitors an unfair advantage in their ability to compete with it by obtaining otherwise unavailable information. After review, the Board found that the Agreement contained legitimate proprietary information worthy of protection from public disclosure. We also found that disclosure of the sensitive financial information could result in serious financial injury if it fell into the hands of competitors. Although the Board found that Comcast's arguments contained merit, the Board also found that confidential treatment should not be accorded to those elements of the Agreement which were connected directly to the ordinance, were contained within the Board's Guide to Franchise Renewal or which have traditionally and historically been part of the franchising process.

We determined that disclosure of this information would not divulge competitively valuable and proprietary information. However, confidential treatment was accorded to technical type items not generally related to the franchising process and to terms and conditions pertaining to services offered by Comcast in connection with the I-Net. We also determined that disclosure of the contents of these terms and conditions could be potentially harmful to Comcast if released to the general public or to the cable operator's competitors since it would provide considerable knowledge of Comcast's business and technical practices.

Finally, RCN argued that in a competitive environment specific financial plans and projections should be maintained as confidential. According to RCN, the release of the specific information would greatly harm its competitive position and give competitors an unfair business advantage. RCN averred that the release of the information was not necessary for the respective municipalities to review the progress of the rebuild since individual briefs would better serve that purpose.

Upon careful review, we have determined that RCN's argument for confidentiality appears weak with respect to disclosure of its financial information since it has voluntarily divulged to the public and the Board its commitment to spend approximately \$75 million to upgrade and/or rebuild the facilities in the thirty-one municipalities it serves. RCN also voluntarily divulged that it had already spent \$25 million. The Board therefore FINDS that RCN has already divulged the specific information contained within the columns designated "Cap Ex," "Already Constructed," "Cap Ex to Complete," "Cap Ex/Homes Passed" and "Cap Ex/Sub." If one knows the total capital expenditure and what has been expended to date, one can readily determine what additional capital expenditures are required to complete the entire project and calculate the figures in all the aforementioned columns. The result may not be as precise a calculation as the information contained within the schedule but nevertheless a reasonable cost approximation can be obtained. In addition, the per mile costs of a rebuild are generally known in the cable television industry. Once a competitor has knowledge of the actual plant miles in a particular municipality, a cost approximation can be made. The Board FINDS that disclosure of the information and actual dollars spent in each of the municipalities contained in the schedule would not harm RCN by giving an unfair business advantage to competitors. The Board also FINDS that RCN has not made a sufficient showing as to why the information contained in the above items should not be released. Therefore, RCN's request for confidential treatment with respect to these items is denied.

With respect to "In Inventory" it could be argued that the affected municipalities do not necessarily need to have this information. The inventory calculation only provides the value of the materials on hand that can be used to effectuate the rebuild/upgrade. However, one can also argue that the affected municipalities do in fact need to know this information because they will then be aware of what is readily available to complete their respective upgrades/rebuilds. Therefore, RCN's request for confidential treatment with respect to this particular item is denied.

As for "Cable Modem Subs," there appears to be no legitimate reason for the municipalities and the public to know this specific information regarding subscribers since it does not relate to the costs and status of the rebuild/upgrade plan. There is no potential benefit to the municipalities in having this information. However, it could be argued that disclosure of the number of cable modem subscribers and the deployment strategy could be potentially harmful to RCN if this information were to fall into the hands of competitors. Therefore, RCN's request for confidential treatment for this particular item is granted. The column pertaining to this item will be redacted on the schedule.

Finally, it is acknowledged that RCN faces overbuild competition from Cablevision in three municipalities it serves, Mendham Borough, Mendham Township and Long Hill Township.² However, it can reasonably be argued that the release of the financial information contained in the schedule relevant to these three municipalities would not be harmful to RCN and benefit its competitor by giving valuable insight into a plan for an overbuild since the information is already

² It is noted that there are no current and pending petitions for overbuild in the other communities RCN serves as it claims and therefore no perceived competition or threat of same in the immediate future.

available. As noted above, if one knows the total capital expenditure and what has been expended to date, one can make a reasonable cost approximation to determine what additional capital is required to complete the project in each upgrade/rebuild municipality. Therefore, RCN's request for confidential treatment for the information contained in the schedule relevant to these three municipalities is denied. As noted above, RCN's request for confidential treatment for the remainder of the municipalities is denied for the same reasons.

RCN ignores the fact that the Board's Order of October 4, 2001 specifically ordered it to file a detailed construction plan for the rebuild/upgrade. In addition, the Board's Order stated that copies of the plan would then be made available to the municipalities. The Board therefore contemplated that the costs and construction timetables along with all other pertinent information would be available for review by the municipalities. Non-disclosure of the information at this juncture would infringe upon municipal review. To do as RCN suggests and provide individual progress briefings to the municipalities in lieu of the information contained within the schedule would compromise and frustrate the Board's directive.

In summary and consistent with the reasoning detailed herein, the Board HEREBY GRANTS RCN's Motion for Partial Reconsideration of the Board's December 19, 2001 Order for the column designated "Cable Modem Subs [subscribers]," and DENIES the motion for the columns designated "Cap Ex," "Already Constructed," "Cap Ex to Complete," "In Inventory," "Cap Ex/Homes Passed" and "Cap Ex/Sub [subscribers]." The information deemed non-confidential shall be made available in the Board's case files ten (10) days after receipt of the Order.

DATED:

BOARD OF PUBLIC UTILITIES
BY:

JEANNE M. FOX
PRESIDENT

FREDERICK F. BUTLER
COMMISSIONER

CONNIE O. HUGHES
COMMISSIONER

ATTEST:

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I/M/O RCN

BPU Docket No. CX01070460

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